IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,	)	No. 63937-4-I
	)	DIVISION ONE
v.	)	
BAILEY C. WITT, Appellant.	)	UNPUBLISHED OPINION
	)	FILED: August 16, 2010

Schindler, J. —Bailey C. Witt appeals his jury conviction of attempted burglary in the second degree. Witt argues insufficient evidence supports his conviction. Witt also raises a number of other issues in his Statement of Additional Grounds for Review. Viewing the evidence in the light most favorable to the State, sufficient evidence supports the conviction, and because Witt's other arguments lack merit, we affirm.

FACTS

At approximately 4:45 a.m. on April 4, 2009, Snohomish County Deputy Sheriff Edward Veentjer was on a routine patrol of downtown Stanwood. Viking Village is a business complex in Stanwood that contains a number of businesses, including a self-service laundry, café, and karate school. As Deputy Veentjer drove by Viking Village,

he noticed a car parked in an alcove. Deputy Veentjer shined his headlights on the car and a man got out. Deputy Veentjer approached the man and asked what he was doing. Before the man could answer, Deputy Veentjer heard what sounded "like a large metal object hitting the ground" coming from the front of the building. Deputy Veentjer immediately called for assistance.

Within seconds, Deputy Tracy Peckham drove to the front of Viking Village. Deputy Peckham saw a man in dark clothing, later identified as Bailey C. Witt, running from the entrance of the self-service laundry towards a parked van. Witt was carrying a dark-colored backpack. As Deputy Peckham approached the van on foot, she briefly lost sight of Witt, but then saw him on the other side of the van. Deputy Peckham noticed that Witt was no longer carrying the backpack. When Deputy Peckham told Witt to stop, he ran into the nearby vegetation. After Deputy Peckham persuaded Witt to come out of the bushes, she arrested him and placed him in the patrol car.

Deputy Peckham located the backpack on the ground next to the rear wheel of the van and found a large crowbar on top of the wheel. With the help of a police dog, Deputy Peckham located work gloves in the bushes where Witt had been hiding.

Meanwhile, Deputy Veentjer used a ladder to climb up onto the roof. Deputy Veentjer observed a set of shoeprints in the frost on the roof that went around the air vent above the self-service laundry and then continued to the front of the building. The shoeprints were from a pair of athletic shoes. One of the shoes was missing a

triangular piece of tread on the heel.

Detective Ted Betts arrived and took photographs of the footprints on the roof. Witt's left shoe was missing a triangular piece of tread on the heel and matched the shoeprints on the roof. The backpack contained a number of metal tools, including a flat pry bar, tin snips, screwdriver, claw hammer, reciprocating saw, coping saw, latex gloves, and assorted electrical connectors and wires.

Detective Betts returned to Viking Village a few days later and determined that it was possible to climb onto the roof from a garbage dumpster behind the building and gain access to the building through the air vent on the roof. Detective Betts photographed a relatively fresh vertical scratch on the siding above the dumpster.

The State charged Witt with attempted burglary in the second degree. Deputy Veentjer, Deputy Peckham, Detective Betts, and the owner of the self-service laundry testified at trial. Detective Betts testified that based on his experience, many of the tools in the backpack are used in committing burglaries. Detective Betts also testified that accessing commercial buildings by way of air vents on the roof is a common way to evade an alarm system. The owner of the self-service laundry testified that nobody had permission to be on the roof that night. Witt did not testify.

The court instructed the jury on the elements of the crime of attempted burglary in the second degree.[1] The defense argued that the evidence did not establish that

[1] Jury Instruction No. 10 states:
"To convict the defendant of the crime of attempted burglary in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

Witt was on the roof, and there was no evidence that he attempted to enter the building. The jury convicted Witt as charged with attempted burglary in the second degree. The court imposed a standard range sentence. Witt appeals.

ANALYSIS

Sufficiency of the Evidence

Witt claims insufficient evidence supports his conviction because there is no evidence that he took a substantial step towards the crime of burglary in the second degree.

Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, it permits a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In reviewing a challenge to the sufficiency of the evidence, we must draw all reasonable inferences from the evidence in favor of the State and interpret the evidence most strongly against the defendant. Salinas, 119 Wn.2d at 201. A defendant claiming insufficiency of the evidence "admits the truth of the State's evidence." State v. Myers, 133 Wn.2d 26, 37, 941 P.2d 1102 (1997). In determining sufficiency, circumstantial evidence is no less reliable than direct evidence. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

---

(1) That on or about the 4th day of April, the defendant did an act that was a substantial step toward the commission of crime of burglary in the second degree;
(2) That the act was done with the intent to commit the crime of burglary in the second degree; and
(3) That the act occurred in the State of Washington, County of Snohomish."

A person is guilty of burglary in the second degree if, "with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a building other than a vehicle or a dwelling." RCW 9A.52.030. Attempted burglary in the second degree requires the State to prove the defendant took a substantial step toward committing the crime of burglary in the second degree. State v. Smith, 115 Wn.2d 775, 782, 801 P.2d 975 (1990); RCW 9A.28.020(1).

A "substantial step" is conduct strongly corroborative of the actor's criminal purpose. State v. Aumick, 126 Wn.2d 422, 427, 894 P.2d 1325 (1995) (citing State v. Workman, 90 Wn.2d 443, 451-52, 584 P.2d 382 (1978)). The jury can infer intent from all of the facts and circumstances. State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999). Mere preparation to commit a crime is not a substantial step. Workman, 90 Wn.2d at 449-50. But where preparation ceases and an attempt begins depends on the facts of a particular case. State v. Nicholson, 77 Wn.2d 415, 420, 463 P.2d 633 (1969). "[W]here the design of a person to commit a crime is clearly shown, slight acts done in furtherance of this design will constitute an attempt." Nicholson, 77 Wn.2d at 420.

Witt concedes the evidence supports the conclusion that he was on the roof of the building near the air vent. But Witt claims there is no evidence that he had the crowbar or the backpack with him on the roof. The record does not support Witt's claim.

Deputy Veentjer testified that while he was at the back of the building, he heard

the sound of "a large metal object hitting the ground" from the front of the building. Deputy Peckham testified that she saw Witt with a backpack, running from the entrance of the building to a parked van. There is no dispute the footprints show Witt jumped off the roof at the front of the building. After arresting Witt, Deputy Peckham recovered the crowbar and the backpack containing a number of tools from behind the van. Viewing the evidence in the light most favorable to the State, the jury could reasonably infer that Witt had the metal tools on the roof.

Witt also relies on Bencivenga and State v. Chacky, 177 Wash. 694, 33 P.2d 111 (1934), to argue that the State did not prove he took a substantial step toward committing the crime of burglary in the second degree. In Biencivenga, the defendant admitted attempting to pry open the back door of a restaurant in the middle of the night during a snowstorm. Beincivenga, 137 Wn.2d at 711. On appeal, the Washington Supreme Court concluded that the evidence was sufficient for a rational jury to find guilt beyond a reasonable doubt even though the defendant did not admit a criminal intent. Beincivenga, 137 Wn.2d at 711. The court held that "it is the province of the finder of fact to determine what conclusions reasonably follow from the particular evidence in a case." Beincivenga, 137 Wn.2d at 711. In Chacky, the court held that evidence that the defendant pried open a padlock of a store with a crowbar at midnight, and then fled from police, was sufficient "to take the case to the jury on the questions of criminal intent and overt act" for attempted second degree burglary. Chacky, 177 Wash. at 695.

Here, although there was no evidence that Witt had the time to pry open the air vent, his conduct clearly establishes the intent to commit the crime of burglary and acts done in furtherance of that plan. Viewed in the light most favorable to the State, the evidence shows that Witt was on the roof of the Viking Village business complex at approximately 4:45 a.m. with a crowbar and other tools typically used in burglaries. Witt was dressed in dark clothing and the backpack containing the other tools was also dark-colored. After Deputy Veentjer drove to the back of the building, Witt dropped the backpack and the crowbar onto the ground, jumped off the roof at the front of the building, and ran away. Detective Betts testified that accessing the building through the air vent is a common means of committing burglary. Detective Betts also testified that the crowbar and the tools in the backpack are the type of tools used in burglaries. Detective Betts said that a pry bar could be used to pop off the vent, the claw hammer could be used to break off other pieces, the tin snips could be used to cut the ducts, and the latex gloves would not leave fingerprints when doing work requiring manual dexterity. Detective Betts stated that although the reciprocating saw would not be useful on the roof, it could be used to cut through the walls between the adjacent businesses from inside the building. Furthermore, his attempt to flee is circumstantial evidence of guilt. State v. Graham, 130 Wn.2d 711, 726, 927 P.2d 227 (1996).

Statement of Additional Grounds

In his statement of additional grounds, Witt argues that his attorney provided

ineffective assistance of counsel by not making the argument that Witt was intoxicated and fled because of an outstanding warrant for domestic violence.[2]

To establish ineffective assistance, Witt must show that counsel's performance was deficient and that prejudice resulted from the deficiency. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). A claim for ineffective assistance of counsel fails if the attorney's conduct can be fairly characterized as legitimate trial strategy or tactics. McFarland, 127 Wn.2d at 334-35. Because of the prejudicial nature of the evidence, the decision to not make the argument that Witt fled because he was intoxicated and had an outstanding warrant can be fairly characterized as a legitimate trial strategy.

Witt also argues his arrest was unlawful because the officers used excessive force when they arrested him, and that his attorney provided ineffective assistance when he failed to raise the issue at trial. We analyze a claim of excessive force under the Fourth Amendment's objective reasonableness standard. Staats v. Brown, 139 Wn.2d 757, 774, 991 P.2d 615 (2000). Facts and circumstances relevant to a reasonableness determination include whether Witt was "actively resisting arrest or attempting to evade arrest by flight." Graham v. Connor, 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). The incident report from the Snohomish County

[2] During Deputy Peckham's testimony, the court sustained defense counsel's objection to Deputy Peckham's statement that Witt "said he thought he had a warrant for domestic violence out of Snohomish."

Sheriff indicates that the officers used a taser two times in response to Witt's aggressive resistance. Because the force used in arresting Witt was objectively reasonable, his attorney's performance was not deficient.

Next, while Witt asserts that some of the testimony and evidence was not credible, we defer to the trier of fact to weigh the persuasiveness of evidence and assess the credibility of witnesses. State v. Boot, 89 Wn. App. 780, 791, 950 P.2d 964 (1998). Finally, Witt contends he was denied a fair trial due to alleged juror prejudice. However, because the record is insufficient to evaluate the claimed errors, we do not address them. See RAP 9.2(b).

We affirm.

Schindler, J.

WE CONCUR:

Spearman, J.

Dwyer, J.